R.D. # 0007-00
Bayonne, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

PERSONNEL COORDINATORS, INC.[1]
Employer

and **CASE 22-RC-11905**

UNITED FOOD & COMMERCIAL WORKERS LOCAL 888, AFL-CIO-CLC
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] The name of the Employer appears as amended at the hearing.
[2] Briefs filed by all the parties have been fully considered.

2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organizations involved claim to represent certain employees of the Employer.[4]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, as discussed *infra*.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[5]

All full-time and regular part-time production employees employed by the Employer at the Hadad Bayonne, New Jersey facility, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act.[6]

The Employer and the Intervenor, contrary to the Petitioner, assert that there exists a contract bar which requires the dismissal of the instant petition as no question concerning representation can appropriately be raised. The Petitioner contends that the collective bargaining agreement proffered as a bar is ineffective as such as the

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[3] The Employer, a Delaware corporation, is engaged in the leasing of employees to the Hadad Limited facility located in Bayonne, New Jersey, the only facility involved herein.

[4] Local 911, International Union of Production, Clerical and Public Employees, herein called the Intervenor, was permitted to intervene based on its collective bargaining agreement with the Employer effective from February 1, 1997 through January 31, 2000. The parties stipulated and I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

[5] The unit description is in accord with the agreement of the parties, which I find, is appropriate for purposes of collective bargaining.

[6] There are approximately 268 employees employed in this unit.

contract at issue contains an invalid union security clause which precludes the contract from serving as a bar to an election.

The record reveals that the Employer entered into an initial collective bargaining agreement with the Intervenor on February 1, 1997, effective for the period from February 1, 1997 through January 31, 2000, covering the unit employees noted above. It is undisputed that neither party to this agreement gave written notice to the other of its intention to change, modify or terminate the agreement which would forestall automatic renewal as provided in Article XXX of the collective bargaining agreement. Accordingly, the Employer and the Intervenor assert that the collective bargaining agreement automatically renewed and is currently effective through January 31, 2001, thus constituting a bar to the instant petition filed on April 11, 2000. The Petitioner contends that the collective bargaining agreement cannot serve as a bar as it contains a union-security provision that is clearly unlawful on its face.

The collective bargaining agreement between the Intervenor and the Employer contains the following clause pertinent here at Article II:

UNION SECURITY

> All present employees who are members of the Union on the effective date of this agreement shall remain members of the Union in good standing as a condition of employment. All present employees who are not members of the Union and all employees who are hired hereafter shall become and remain members in good standing of the Union as a condition of employment on and after the effective date of this Agreement, whichever is the later. Where the effective date is made retroactive, the execution date shall be substituted for the effective date.

An examination of the union-security clause and the entire collective bargaining agreement reveals no provisions that provide employees with the requisite

30-day statutory grace before requiring membership in the Union.[7] Section 8(a)(3) of the Act provides in pertinent part:

> It shall be an unfair labor practice for an employer--(3) by discrimination in regard to hire or tenure of employment…to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization…to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

The Board in *Paragon Products Corp., 134 NLRB 662, 666 (1962)* held that:

> …only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefor incapable of a lawful interpretation.

The Board in *Paragon*, supra at 666, explained that such unlawful provisions include, *inter alia*, "…those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period…"

The Employer and the Intervenor contend that the contractual union-security provision is ambiguous and not clearly unlawful on its face, therefore, not removing the collective bargaining agreement as a bar to the petition. In this regard, they contend that the second sentence of the above quoted union-security language does

[7] The Supreme Court in *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), held that Section 8(a)(3) of the Act permits unions and employers to negotiate agreements that require union "membership" as a condition of employment for all employees. See also *Association For Retarded Citizens*, 327 NLRB No. 88 (1999)

"not make any sense" as the phrase whichever is the later creates an ambiguity.[8] The Employer and the Intervenor further assert that an examination of extrinsic evidence is required to clarify the intent of this provision. Specifically, the Employer and the Intervenor contend that Article IV of the contract and the recognition agreement of December 5, 1996, demonstrate that the parties intended to provide a statutory 30-day grace period for employees before requiring membership in the union as a condition of employment. Article IV provides, inter alia that upon completion of 30 days of employment, probationary employees are eligible for certain benefits.[9] The recognition agreement, dated December 5, 1996, provides in pertinent part that:

> The Employer agrees that it will give effect to the following union security clause:
>
> > 1. All present employees who are members of the Union on the effective date of this Agreement or on the date of execution of this Agreement, whichever is the later, shall remain members in good standing of the Local Union as a condition of employment on and after the thirty first (31st) day following the beginning of their employment or on and after the thirty first (31st) day following the effective date of this Agreement, whichever is later.

Thus, the Employer and the Intervenor assert that the union-security provision in

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[8] I note that the testimony of the Intervenor's President, Eugene Perolo, belies the contention that the language of Article II is ambiguous as Perolo stated in response to a question as to whether the clause was clear to him "Yes basically yes it is. Yes whichever is the later either the initiation of the contract date or your coming in after that. That is how it was meant." This testimony was in contrast to the Employer's Vice-President of Operations and Labor Relations, Warren Ullrich, who stated that the cited language of Article II "…doesn't make any sense to me at all."

[9] The contractual probationary period for newly hired employees is 90 days.

Article II of the collective bargaining agreement was intended to mirror the above noted extrinsic evidence that clarifies the intent of the parties to provide the requisite 30-day statutory grace period.[10] The record reveals that the collective bargaining agreement between the Employer and the Intervenor does not incorporate by reference the recognition agreement of December 5, 1996.

The Board has uniformly held that "…the legality of a contract asserted as a bar is to be determined in the representation proceedings from the face of the contract itself and that extrinsic evidence will not be admitted in a representation proceeding to establish the unlawful nature of such a contract." *Loree Footwear Corporation*, 197 NLRB 360 (1972); *Jet-Pak Corporation*, 231 NLRB 552 (1977). In a representation case, as here, the illegality of a union-security provision must be determined from the contact itself.

Based upon the above and the record as a whole, I find that the union-security clause contained in the contract itself specifically withholds from incumbent nonmembers and/or new employees the statutory 30-day grace period they are entitled to and, therefore, the collective bargaining agreement cannot serve as a bar to the petition in this matter. In this regard, I note that the language of the recognition agreement, even assuming that it provides the requisite statutory grace period, is not incorporated by reference into the collective bargaining agreement which superceded that recognition. This is precisely the type of extrinsic evidence that the Board has

[10] The Employer and the Intervenor explain the failure to incorporate the union-security language of the recognition agreement into the subsequent collective bargaining agreement as a clerical error.

refused to allow in representation proceedings.[11] Thus, in determining whether a contract serves as a bar, the Board will only examine the terms of the contract as they appear within the four corners of the instrument itself. *Jet-Pak Corporation*, supra at 553. Further, I find that the probationary clause at Article IV of the collective bargaining agreement cannot be interpreted as providing the necessary 30-day grace period required by the statute. Thus, I find that the collective bargaining agreement contains a union-security provision that is clearly invalid on its face and, therefore cannot serve as a bar to the petition and an election in this proceeding. *Paragon Products Corp.,* supra*; Standard Molding Corp., 137 NLRB 1515, 1516 (1962); Jet-Pak Corporation,* supra; *Electrical Workers IUE Local 444 (Paramax Systems), 311 NLRB 1031 (1993);* Cf. *Suffolk Banana Co., Inc*., 328 NLRB No. 157 (1999).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found to be appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did

[11] In its post-hearing brief, the Employer asserted that the Hearing Officer committed error and violated its due process rights by precluding the introduction of certain extrinsic evidence or further development of such evidence. I note that the Employer did not itself seek to call any witnesses or introduce documentary evidence in support of its position at the hearing. Further, the record reveals that the Hearing Officer allowed the Employer to make an offer of proof as to the admissibility of an extrinsic evidence document, which offer the Hearing Officer correctly rejected. Thus, I find that the Employer was not denied due process and reliance on *North Manchester Foundry, Inc.,* 328 NLRB No. 50 (1999) is misplaced. The Employer's motion to reopen the record is denied.

not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Food & Commercial Workers Union Local 888, AFL-CIO-CLC; Local 911, International Union of Production, Clerical and Public Employees; or Neither.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list

available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before May 19, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by May 26, 2000.

Signed at Newark, New Jersey this 12th day of May 2000.

/s/Bernard Suskewicz

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